



April 18, 2005

Morning Business:
Senator Kyl

Noteworthy:

“In the previous Congress, Democrats could plausibly argue that breaking precedent was justified to prevent Bush from "packing the courts" when he was a "minority president" who took office only due to Supreme Court intervention. That justification was upended in 2004. Bush is now a majority president and deserves to have his judicial nominations given an up-or-down vote in the Senate. Democrats are obstructing that process.”

-Morton Kondrake, *Roll Call*, 4/18/05

Releases:

Senator McConnell urges Democrats not to shut down the government

Floor Statement by Senator Jon Kyl, April 18, 2005

Mr. President, I would like to speak in morning business to the point just discussed by my colleague from Florida. I understand that another Senator was going to be here as well and when he arrives, I'll yield the floor. I think it's important for my colleagues and for the American people to appreciate a little bit of background of this issue with respect to judges.

My colleague from Florida makes a point that he has voted for most of the President's judicial nominees, and indeed that's been the case with every Senator for every President. But until the last two years, we had voted both for district court nominees and circuit court nominees. Two years ago the Democratic minority began filibustering circuit court nominees. That's where President bush has had a lower percentage of his nominee as proved than any President since Franklin Roosevelt for those important circuit court positions. In fact, a third of the President bush's circuit court nominees were filibustered or could not be brought to a vote because they would have been filibustered. Only 17 out of I believe around 35. So when our colleagues on the other side of the aisle talk about the large number of judges that they have approved, they are folding in all of

the federal district court nominees that everybody has always voted for. That's not the appropriate measure.

The question is how many circuit court nominees, and never before in the history of our country have we seen circuit court nominees or district court nominees filibustered in this manner. Ten separate judges we couldn't come to a final up-or-down vote. Seven more would have seen the same fate had they been brought forward. That's never happened before in the history of country.

I saw our colleague from Illinois discussing the fact that a former Senator from New Hampshire had, on this floor, talked about filibustering a couple of judges for the 9th circuit court of appeals. And in fact that Senator had said that. And I think the interesting point is that even though he, a single Senator, wanted to filibuster the nominees — their names were Berzon and Paez — the Republican leader, Trent Lott from Mississippi, made an arrangement with the then-Democratic leader, Tom Daschle from South Dakota, that they wouldn't be filibustered. We filed cloture which is the petition to bring the matter to a close so that we could take a final vote. And Senators on both sides of aisle supported the cloture petition. They supported getting to a final vote on those two judges.

Of course, cloture was invoked, meaning that he were not filibustered. They were brought up for a vote. Some Senators voted against them. I, in fact, voted for Berzon and against Paez, but the net result was they were both sitting on the 9th circuit court of appeals. They were not filibustered. There is no case of a filibuster of a circuit court judge. None.

Secondly, the only other situation in which it is alleged that a filibuster occurred was with Abe Fortas, whose name was withdrawn by Johnson the day after a cloture vote failed to succeed. But as Senator Griffin from Michigan, who was then leading that opposition to Abe Fortas, has told me and others, there was no effort to filibuster because they had the votes to kill the judge. They simply hadn't had time to debate him which is why they voted against the cloture, but as a result of the President acknowledging he had no support in the Senate, his name was withdrawn.

There's never been a filibuster of the supreme court or circuit court judge in the United States Senate. It's imply erroneous to suggest that there has been.

Nor is it connect to say we've been voting on all of these judges. If you take out the judges about whom there's no controversy, there's a huge issue because fully a third, a third of the President's circuit court nominees were not voted on because of this new filibuster by the Democratic minority.

I think we need to have some perspective. Who is changing the rules here? Until two years ago, all of judges got up-or-down votes. In fact, judges that couldn't even get out of Judiciary Committee without a majority were granted the privilege or courtesy of a vote on the Senate floor.

During the debate when Clarence Thomas was being confirmed, several leading Democratic Senators took the floor to oppose Justice Thomas. And they said they actually had thought about trying to filibuster his nomination but that that would be wrong because filibustering judicial nominees is wrong. Senator Leahy, Senator Kennedy, and others took to this very floor and said, we don't know whether we're going to defeat Clarence Thomas or not but we're not going to defeat with a filibuster because that would be wrong. And sure enough, they were correct, they lost the vote 48-52. He was confirmed, but I admired them because they stood for principle, the rule and the tradition of this body had always been to give the nominee as an up-or-down vote. But if they could get 51 votes for confirmation, they became a circuit court judge or a Supreme Court Justice. And that's what happened in the case of Clarence Thomas.

Now, all of a sudden, it's been turned around and the Democratic minority, almost to a person has said that they believe judges should be filibustered. And that the President's nominees are not going to get an up-or-down vote if they decide that they want to filibuster a particular nominee. As I said, at least a third of circuit court nominees so far have been filibustered or threatened with a filibuster and it's our understanding that that practice will continue unless we can get back to the way it's always been, the traditional role of the Senate in providing advice and consent with a majority vote of or down.

It's also been suggested that the President is nominating a new, wild variety or variant of lawyers and judges to be circuit court judges now, way out of the mainstream kind of people. This, of course is absolutely ludicrous. The kind of people that President Bush has nominated are respected jurists or lawyers. The American Bar Association, which used to be the Democrat's gold standard for approving of judicial nominees has judged all of these candidates qualified. And yet, somehow, some of our colleagues on the left say they are out of mainstream.

Now, my colleague on the Judiciary Committee, the Senator from New York, for example, has made this charge on several occasions. But I just ask, who is probably more representative of mainstream — a single Senator from a state like, for example, New York, or the President of the United States who had to get elected with support from all over this country? I don't think you would say George Bush is out of the mainstream of this country.

Who are some of the people that he has nominated? Some are judges that have had to stand for election. For example in California and Texas. And they have received supermajorities, 70% or 80% — I've forgotten the exact numbers — of support from the citizens of their states. And one is a blue state. One is a red state. But when well over 50% or over 60% of the citizens in those states vote to support these judges to continue in office on their state supreme court, you'd hardly say that these nominees are out of mainstream. And yet those are, in the case of these two particular judges, Janice Rogers Brown from California, Priscilla Owen from Texas, those are two of the judges for whom this filibuster has been applied.

It doesn't make sense, Mr. President, to suggest that a tradition of this Senate to give people an up-or-down vote is all of a sudden going to be overturned because all of a sudden a President is proposing people that are wildly out of mainstream.

So what has the Republican majority at least considered doing? Simply returning to the way it has always been. To going back to the 200 years before two years ago and giving people an up-or-down vote. You can still vote against the nominee. You don't have to vote for the nominee, but at least give them an up-or-down vote.

We do that based upon the precedents set by the then-Majority Leader of this body, Robert Byrd from West Virginia, who on not fewer than four separate occasions utilized the precedents of this body to insure that dilatory tactics could not prevail in this body and we could move forward with the business of the Senate. It is the same precedent that can be used to reestablish the up-or-down vote, which has been the tradition of this body all along. That is not rubber stamping; that is giving due consideration and giving them an up-or-down vote at the end of the day.

When Americans look at this battle in the Senate, they have to wonder why this is happening, why it's so important. I suspect it may have something to do with the fact that there might be a vacancy on the U.S. Supreme Court and that our friends on the other side of the aisle are so afraid that President Bush might nominate someone who could gain majority support that they are prepared to actually refuse the nominee an up-or-down vote. That would be unprecedented in the history of this body.

Some have called this the nuclear option because they threaten to blow the Senate up if we try to return to the traditional rule of an up-or-down vote in the Senate. I think that's a very unfortunate name and a very unfortunate threat. Nobody should be threatening to "go nuclear" or "blow the place up" or prevent the Senate from doing its business. Our constituents sent us here for a reason, to get work done, to pass the budget, to pass the appropriations bill, to pass the bill before the body, the supplemental appropriations bill that will literally fund our troops' effort in Afghanistan and Iraq, to pass an energy, to pass a defense authorization bill, and all of the other important things that they want us to do here.

Yet, we have some colleagues suggesting if they don't get their way on these judges, like the schoolyard bully who has a call going against him by the referee picks up his ball and goes home so the rest of kids can't play. Is that the threat here to pick up the ball and go home so the rest of us can't do the business we were sent here to do.

Mr. President, let me make a final prediction here. Last time we met as members of judiciary, we couldn't get a quorum to do business. Not one member of the minority party showed up. We have to have one to get a quorum. This was not in the last minute. There were three members who have gone to the funeral of the pope. That's three out of nine. None of the rest showed up. We have another meeting on Thursday and we're going to need to pass the judges out so that we can consider them on the floor here. I'm going to predict to you that they won't give us a quorum then either. They won't show up

for this they do they filibuster it so we can't get the judge as adopted. I predict right now the judges agenda will not be passed out. They might pass out one or two but they won't allow us to pass all of those judges so they can be considered by the full body here. It was members of minority body that complained while Republicans never filibustered they kept some of President Clinton's judges bottled up in committee. We'll see. There are six or seven judges pending, we'll see whether or not they show up for the meeting so there's a quorum, and enable us to pass them out so there's a full body to begin debating their merits or instead they talk and talk and talk until the meeting has to end until nobody else is around, we don't have a quorum or they don't show up for a quorum. We'll see what they do, Mr. President. I'm going to predict right now my colleagues won't allow us to get the judges to the floor so that we can begin the debate and the consideration of whether they should be confirmed. That would be a shame and a violation of what this Senate has always done in the past. Even when we didn't particularly think a nominee should receive an up or down -- an affirmative vote on the floor. I think Clarence Thomas was in this situation. The committee passed him to the floor to see what the full body would do, to give its advice and consent which is what the Constitution calls upon us to do.

I close by urging my colleagues not to confuse this discussion with erroneous information or to talk about things that aren't so or history that never was, but rather to approach on the basis of moving forward in a bipartisan way to fulfill our constitutional responsibilities to grant these judges an up-or-down vote, to provide our advice and consent to so-that we can put the people on the court in these very important positions to serve the American people.

April 18, 2005

The Honorable Harry Reid
S-221, The Capitol
Washington, D.C. 20510

Dear Harry:

I have reviewed your March 15, 2005 letter to Majority Leader Frist. While I certainly agree with your call to work together on the judicial nominations process, I am greatly concerned about your statement regarding shutting down Senate business and, by extension, the federal government. A government shut down would be rash and unwise, and the American people deserve better from us than such an act, which is surely inconsistent with "working together." I urge you to reconsider taking this action.

We can all agree there is much important work to be done in the Senate. While our economy is strong, gas prices are way too high; people feel these costs every time they fill up at the pump. This Senate needs to enact a long-term energy policy to reduce our dependence on foreign oil. In addition, our transportation infrastructure needs improving. Millions of Americans take the roads and rails everyday to get to work and

keep this country moving. It is thus critical that the Senate pass a highway bill. We also must reform America's tax code so that it is fairer for all Americans and leads to a robust economy. We need to continue our efforts to reform Social Security so it is strong and secure for future generations.

Rather than work with us in a spirit of bipartisan cooperation, the Democratic Caucus has indicated it will continue its blockade of circuit court nominees. Democrats' continued insistence on obstructing judicial nominees threatens our Constitution's careful separation of powers among the three branches of government. Never before in the history of the country has a minority of senators filibustered—on a systematic, repeated, and partisan basis—well-qualified judicial nominees. But in the last Congress, it occurred on ten different circuit court nominations within only sixteen months.

Majority Leader Frist has repeatedly sought to afford your caucus generous time in which to debate these nominations. But he has been consistently rebuffed, including being told on one occasion that “there is not a number [of hours] in the universe that would be sufficient” to discuss a nominee. Nevertheless, Senator Frist continues his efforts to reach an accommodation. He has invited Democrats to come to the table and work with us to restore the 200-year-old norms and traditions of the Senate. Instead of shutting down the government, I urge you to work with the Majority Leader to repair our broken judicial confirmation process.

Sincerely,

Mitch McConnell